No. 48801-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IAN AND KERI SCHUMACHER,

Plaintiffs/Respondents,

v.

T. GARRETT CONSTRUCTION INCORPORATED,

Defendant/Appellant.

BRIEF OF APPELLANT T. GARRETT CONSTRUCTION INCORPORATED

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I. INTRODUCTION

This case arises from the construction and sale of a new single family residence in Edgewood, Washington built and sold by Appellant T. Garrett Construction Incorporated ("TGC") to the Respondents Ian and Keri Schumacher.

TGC does not challenge any of the trial court's findings of fact. The issues on this appeal are entirely legal.

There are three components to this appeal. The first component concerns construction defects. The trial court concluded that: "The Schumachers are not entitled to any damages for construction defects or improperly performed work". (COL 5, CP 108). Nonetheless, the trial court awarded damages to the Schumachers on 2 out of 22 of their construction defect claims.

The second component of this appeal concerns the cedar fence located behind the Schumachers' house. The sales flyer and the MLS listing both advertised a cedar fence on the property. These representations were true. There was an existing cedar fence behind the Schumachers' house. (FOF 8, CP 102). Hypothetically, even if there were no cedar fence, this claim is barred because: (1) the sales flyer and the MLS listing were not part of the parties' purchase and sale agreement

(which contained an integration clause) and (2) the inspection contingency addendum precludes said claims.

The third component of this appeal concerns the trial court's award of attorney fees and costs to the Schumachers. At trial, the Schumachers asserted damages in the amount of $71,499.07[1], of which $23,496.60 pertained to alleged construction defects and $48,002.47 pertained to items allegedly not received by the Schumachers. The trial court awarded $9,772.50 to the Schumachers. This represents 13.67% of their alleged damages. The Schumachers prevailed on only 2 out of 22 of their construction defect claims and prevailed on only 1 out of 27 of their breach of contract claims for items not received. The Schumachers should not have been deemed the prevailing party.

II. ASSIGNMENTS OF ERROR

TGC assigns error to:

1. The trial court's Conclusion of Law no. 12 that the Schumachers are entitled to damages of $6,022.50 for improperly installed stone on their garage wall.

[1] This figure excludes $25,000 in damages sought by the Schumachers under the Consumer Protection Act.

2. The trial court's Conclusion of Law no. 13 that the Schumachers are entitled to $350.00 for improperly installed cabinets and trim in their kitchen.
3. The trial court's Conclusion of Law no. 14 that the Schumachers are entitled to $3,400.00 because TGC did not build them a new cedar fence.
4. The trial court's determination that the Schumachers were the prevailing party for purposes of an award of attorney fees and costs. TGC is not challenging the amount of attorney fees or costs awarded to the Schumachers.

III. ISSUES PRESENTED

1. Did the trial court err in awarding damages to the Schumachers for TGC improperly installing stone on their exterior garage wall and TGC improperly installing cabinets and trim in their kitchen?
2. Did the trial court err in awarding damages to the Schumachers for TGC not building them a new cedar fence?
3. Did the trial court err in determining that the Schumachers were the prevailing party and awarding them attorney fees and costs?

IV. STATEMENT OF THE CASE

TGC is a construction contractor in the business of remodeling homes and spec building. (FOF 2, CP 102). TGC is owned by defendants Todd and Jessica Yost, husband and wife. (FOF 1). TGC acquired vacant land in Edgewood, Washington and subdivided it into five lots with the intention of building and selling houses on the lots. (FOF 3). In 2013, TGC commenced construction of the first house, which was on lot 3 and commonly known as 3722 114th Ave E, Edgewood, WA 98372. (FOF 4). All further references in this brief to "the house" or "the home" refer to this house.

Prior to the house being completed, TGC listed the house for sale on the MLS listing service through its real estate agent Laura Petkov. (FOF 5). Ms. Petkov prepared a real estate flyer and placed a listing on the MLS listing service, which contained information and details about the house such as high tech cabling, skylights, cedar fence, ceiling fans, no HOA dues and the size of the lot. (FOF 7, Exs. 8 and 9).

In early October 2013, the Schumachers toured the house with their real estate agent Doug Walker. At the time of this tour, the house had been framed, the roof and all windows had been installed and there was an existing split-rail cedar fence that separated the Schumachers' back yard from the neighboring property. (FOF 8, Ex. 49 photos H, I and J, Ex.

76 photo 5). On October 15, 2013, Ms. Petkov sent an email to Mr. Walker with a builder specification sheet ("spec sheet") dated October 8, 2013 that Ms. Petkov had obtained from the internet. The spec sheet listed certain features and finishes of the house and the surrounding property. (FOF 9). On October 20, 2013, the Schumachers, through their agent Mr. Walker, submitted a signed real estate purchase and sale agreement (hereinafter "the REPSA") to TGC offering to purchase the house for $469,900. (FOF 10, Ex. 1).

The REPSA incorporated by reference the spec sheet dated October 8, 2013. (FOF 12, Ex. 1). The REPSA did not incorporate by reference the sales flyer or the MLS listing for the house. (FOF 13, Ex. 1). The REPSA contained an integration clause and an attorney fee clause. (FOF 14, Ex. 1). The REPSA contained an Inspection Addendum providing in part that:

> This Agreement is conditioned on Buyer's subjective satisfaction with inspections of the Property and the improvements on the Property.

(FOF 15, Ex. 1). The REPSA provided that the inspection contingency shall be deemed waived unless the Buyer gives notice to Seller and terminates the agreement. (FOF 15, Ex. 1). The REPSA further provided:

> ATTENTION BUYER: If Buyer fails to give timely notice, then this Inspection contingency shall be deemed

> waived and Seller shall not be obligated to make any repairs or modifications.
>
> ATTENTION BUYER: . . . Buyer's inaction during Buyer's reply period shall result in waiver of this Inspection condition, in which case Seller shall not be obligated to make any repairs or modifications whatsoever AND THIS CONTINGENCY SHALL BE DEEMED WAIVED.

(FOF 15, Ex. 1).

The REPSA contained an Addendum entitled "Optional Clauses Addendum". (Ex. 1, 8th and 9th pages). Section 11 of said addendum provided the option of a "Home Warranty". The box to the left of Section 11 was left blank by the parties. (Ex. 1, 9th pg.).

On October 21, 2013, Ms. Petkov sent an email to Mr. Walker informing him that she had previously sent him the wrong spec sheet and attached to her email was the correct spec sheet dated October 21, 2013. (FOF 16). On October 22, 2013, TGC signed the REPSA. (CP 104, FOF 17). The same day, TGC and the Schumachers initialed each page of the spec sheet dated October 22 reflecting changes that had been made to the spec sheet. (FOF 18).

TGC sent a document entitled Limited Builder's Warranty ("LBW") to the Schumachers and requested them to sign and return it to TGC, which the Schumachers did. The LBW was not negotiated and was not incorporated by reference into the REPSA. The parties, through

their legal counsel, stipulated at trial that the LBW is unenforceable, not binding and inapplicable to this case. (FOF 19, COL 3).

Between October 22, 2013 (date when the REPSA was signed) and January 31, 2014 (date of closing), TGC and the Schumachers communicated regularly and met at the house on approximately 9 to 10 occasions to discuss the Schumachers' selections as to finishes and other items in the house. (FOF 25). The parties executed three written change orders, which increased the price of the house from $469,900 to $501,295. (FOF 20).

TGC and the Schumachers made certain trades and substitutions of items listed on the spec sheet with other items. (FOF 26). The Schumachers consented to certain items that were different from what was contained in the spec sheet. (FOF 27).

TGC constructed a pre-stained wood fence (not a cedar fence) in the front of the house and which ran along the side of the house. (FOF 24).

A formal walk-through occurred on or about January 22, 2014, during which the Schumachers inspected and examined the house with Mr. Yost accompanying them, lasting at least thirty minutes. (FOF 28). The Schumachers did not bring any notes with them to the walk-through nor did they bring any other person with them to the walk-through. TGC

did not prepare or provide a checklist at the walk-through. (FOF 29). The Schumachers made certain requests to TGC during and immediately after the walk-through, which TGC responded to and satisfied. (FOF 30). The Schumachers never requested to cancel the sale and/or have their earnest money returned to them. (FOF 31).

The house passed all inspections by the building authorities and a certificate of occupancy was issued by the building department. (FOF 33). Closing occurred on January 31, 2014, which was the date that TGC executed a statutory warranty deed to the Schumachers. (FOF 34).

Subsequent to the date of closing, the Schumachers contacted TGC and complained about a number of problems, including exterior stone veneer around their garage, stone fireplace, painting, caulking, front porch posts, broken gate, fence, electrical, sheetrocking garage stairs, dishwasher, kitchen cabinets and trim, a hump that appeared in the main floor and nail pops and stress cracks in the drywall in the master bedroom. (FOF 37).

The stone on the exterior garage wall was improperly installed by TGC. (FOF 40). In 2015, Reliable Masonry Service submitted a bid to the Schumachers in the amount of $5,500 plus sales tax ($522.50 computed at 9.5%) to remove and replace the stone on the exterior garage wall. (FOF 41).

In January 2015, the Schumachers filed this lawsuit against TGC and the Yosts. (CP 1). The Schumachers alleged in part that there were construction defects in the home and that they did not receive certain improvements that TGC had promised. (CP 2-3). TGC answered the complaint, but did not assert any counterclaim. (CP 9-13). At trial the Schumachers alleged damages totaling $71,499.07, not including $25,000 in alleged damages under the Consumer Protection Act. (Ex. 30).

The trial court dismissed all of the Schumachers' claims (COLs 1 – 11, CP 107-110), except that the trial court awarded the Schumachers principal of $9,772.50, consisting of $6,022.50 for improperly installed stone on their garage wall, $350.00 for improperly installed cabinets and trim in their kitchen, and $3,400.00 because TGC did not build a new cedar fence. (COLs 12 - 14).

V. ARGUMENT

A. STANDARDS OF REVIEW

Concerning TGC's challenges to the construction defects award and the cedar fence award, the standard of review is de novo, since there are no facts in dispute. *Tae T. Choi v. Sung*, 154 Wn. App. 303, 313, 225 P.3d 425 (2010) ("We review de novo questions of law and conclusions of law.").

The trial court's ruling that the Schumachers were the prevailing party for purposes of an attorney fee award should be reviewed under the error of law standard, which permits the reviewing court to substitute its judgment for that of the trial court. *Trotzer v. Vig*, 149 Wn. App. 594, 612, 203 P.3d 1056 (2009) ("Although the determination of the prevailing party has been described as a mixed question of law and fact, we review the trial court's determination under the error of law standard."). TGC is not challenging the amount of attorney fees or costs awarded to the Schumachers.

B. CONSTRUCTION DEFECTS

1. The Defects

The Schumachers claimed that there were 22 construction defects in their home: (1 cracked boards/caulking, 2 paint entire house, 3 front porch post, 4 stain fencing / replace gate, 5 hump in floor, 6 dishwasher, 7 **kitchen cabinetry**, 8 garage stairs, 9 bowing header over garage, 10 cracked drywall and paint in master bedroom, 11 clean / dump fees, 12 GFI for sprinkler circuit, 13 **stone on garage façade**, 14 stone on fireplace, 15 mailbox, 16 driveway, 17 doorbell, 18 smurf tube, 19 laundry room floor, 20 hole in the porch, 21 edges of hardwood floor, 22 electrical breaker) (FOF 37; COL 5, Exs. 24-30; 35-39). The bold face items above are the items at issue on appeal.

The trial court rejected 20 out of 22 of the Schumachers' claims for construction defects because TGC did not make any express warranty of workmanship and there were no implied warranties applicable. (COLs 1 – 5). The trial court should have rejected not just 20, but all 22 of them.

2. Caveat Emptor

In the context of the sale of real property in Washington, the doctrine of caveat emptor applies, unless an exception applies, such as: (1) fraudulent concealment[2], (2) implied warranty of habitability[3] or (3) the Consumer Protection Act[4]. The Schumachers did not assert any claim for fraudulent concealment. The Schumachers asserted that TGC breached the implied warranty of habitability and violated the Consumer Protection Act, but both of these claims were rejected by the trial court. (COLs 2, 4).

Although the doctrine of caveat emptor in the context of the sale of real property has been chipped away at[5] by the exceptions listed above, the

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[2] *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 523, 799 P.2d 250 (1990).

[3] *Id.* at 519-22.

[4] *Griffith v. Centex Real Estate Corp.* 93 Wn. App. 202, 217, 969 P.2d 486 (1998) ("The CPA has repeatedly been applied in the context of home purchases.").

[5] *See, e.g., Johnson v. Olsen*, 62 Wn.2d 133, 135, 381 P.2d 623 (1963) ("Caveat emptor has **lost much of its potency** when actionable fraud exists.") (Emphasis added); *McPherson v. Purdue*, 21 Wn. App. 450, 453, 585 P.2d 830 (1978) ("In this state, the rule of caveat emptor is **no longer rigidly applied** to the complete

doctrine of caveat emptor has never been abrogated and is still the default rule unless an exception applies or if the seller gives an express warranty to the buyer.

The trial court erroneously stated that the doctrine of caveat emptor does not apply in Washington. The trial court stated:

> I remember the Supreme Court saying in response to caveat emptor, that they called it "an obnoxious legal cliché." And I agree with that. I don't think caveat emptor is the law in Washington.

(Oral Decision pg. 6, lines 4-9). The trial court was presumably referring to *Foisy v. Wyman*, 83 Wn.2d 22, 25, 515 P.2d 160 (1973) in which our Supreme Court quoted the Supreme Court of Wisconsin, which stated:

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor.

Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, (1961). *Foisy v. Wyman* involved the implied warranty of habitability in the context of residential leases—not the sale of a new home by a builder-vendor. *Foisy v. Wyman* did not abrogate the doctrine of caveat emptor. *Foisy v. Wyman* merely held that that doctrine of caveat emptor is not absolute, but is

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exclusion of any moral and legal obligation to disclose material facts not readily observable upon reasonable inspection by the purchaser.") (Emphasis added).

subject to certain exceptions, one of which is the implied warranty of habitability. The *Foisy* court stated that "the old rule of caveat emptor in the leasing of premises has been undergoing judicial scrutiny" (*Foisy*, 83 Wn.2d at 25) and that there is a "current trend toward finding an implied warranty of habitability in leases". *Foisy*, 83 Wn.2d at 26. *Foisy v. Wyman* stands for the proposition that the implied warranty of habitability is an exception to the doctrine of caveat emptor—not that the doctrine of caveat emptor has been abrogated.

In short, although there are exceptions to the doctrine of caveat emptor in the sale of a home, the doctrine of caveat emptor has never been abrogated and applies in the absence of an applicable exception, such as the implied warranty of habitability or fraudulent concealment.

3. No Express Warranty

TGC did not make any express warranty to the Schumachers that TGC's construction work would be performed in a workmanlike manner, to industry standards or to any other standard. (CP 108, COL 5).

The REPSA contained an optional express warranty available for purchase, but this option was not selected. See paragraph no. 11 "Home Warranty" on the ninth page of the REPSA (Ex. 1).

4. No Implied Warranties

a. No Implied Warranty of Workmanship

Conclusion of Law no. 5 (unchallenged) states that Washington law does not recognize an implied warranty of workmanlike construction. (CP 108). This Conclusion of Law is based on *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 42, 114 P.3d 664 (2005), in which the court stated:

> The Warners do not cite a single Washington case recognizing an implied warranty for workmanlike performance. Moreover, both Divisions One and Three of this court have concluded that such an implied warranty does not exist in a construction contract. As Division One has noted: "Contracting parties have their remedies for breach and can negotiate for warranties if they so choose. An action for implied warranty of workmanlike performance in construction contracts would be strikingly similar to a cause of action for negligent construction, which is not recognized in Washington." *Urban Dev., Inc.*, 114 Wn. App. at 646 (citing *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987)).

Although there are some jurisdictions[6] that recognize an implied warranty of workmanship in the sale of a home, Washington is not one of them. *Warner*, 128 Wn. App. at 42 (Division II, 2005); *Anderson Hay &*

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[6] *See, e.g., Turner v. Westhampton Court, L.L.C.*, 903 So. 2d 82, 93 (Ala. 2004) ("In the context of the sale of a new house, a builder-vendor such as [the defendant] is obligated to construct a house that it will offer for sale in a workmanlike manner.")

Grain Co., Inc. v. United Dominion Indus., Inc., 119 Wn. App. 249, 261, 76 P.3d 1205 (Division III, 2003)[7]; *Urban Dev., Inc. v. Evergreen Bldg. Products, LLC*, 114 Wn. App. 639, 645-46, 59 P.3d 112 (Division I, 2002).

The trial court's conclusion that Washington does not recognize an implied warranty of workmanlike construction was not challenged by the Schumachers. It is the law of this case. *See Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014).

b. No Implied Warranty of Fitness for a Particular Purpose

The Schumachers claimed that they were entitled to damages for construction defects because TGC breached an implied warranty of fitness for a particular purpose. The trial court rejected this claim because the implied warranty of fitness for a particular purpose does not apply to the sale of real property such as a residential home. (CP 107, COL 1).

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[7] In *Anderson Hay & Grain Co., Inc.*, the court stated:

> The issue is whether the trial court erred in granting summary judgment dismissal of Anderson's claim of breach of contract and deciding Tri-Ply did not breach an implied covenant of good workmanship by failing to exercise ordinary care in constructing the building. This alleged cause of action may not exist in Washington. Generally, construction contracts do not contain implied warranties for workmanlike performance.

Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc., 119 Wn. App. at 261.

c. Implied Warranty of Habitability

The Schumachers claimed that they were entitled to damages for certain of the alleged construction defects because TGC breached an implied warranty of habitability[8]. The trial court rejected this claim because none of the construction defects were serious enough to pose a significant safety risk to the occupants of the home. (COL 2). "The implied warranty of habitability does not cover alleged defects that involve mere defects in workmanship". *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 770, 193 P.3d 161 (2008).

5. No Negligent Construction

Washington does not recognize a cause of action for negligent construction. According to the Supreme Court:

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[8] When a builder-vendor sells a new residential house, the buyer is the beneficiary of an implied warranty of habitability that the home will be safe for habitation.

> The doctrine of implied warranty of habitability imposes liability upon builder-vendors in favor of original purchasers of residential property for egregious defects in the fundamental structure of a home.

Stuart v. Coldwell Banker Comm'l Group, Inc., 109 Wn.2d 406, 417, 745 P.2d 1284 (1987); *See House v. Thorton*, 76 Wn.2d 428, 435, 457 P.2d (1969) ("the sliding, slipping, and cracking of the foundation and floors, and the cracking and shifting of the walls . . . rendered the premises unusable as a dwelling.").

> Currently, the State of Washington does not recognize a cause of action for negligent construction on behalf of individual homeowners. Beyond the terms expressed in the contract of sale, the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability, which arises from the sale transaction.

Stuart v. Coldwell Banker Comm. Group, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987).

6. Garage Wall and Kitchen

Despite Conclusion of Law no. 5 (unchallenged), which states that "[t]he Schumachers are not entitled to any damages for construction defects or improperly performed work", the trial court nonetheless awarded damages to the Schumachers on 2 out of 22 of their construction defect claims: $6,022.50 for improperly installed stone on the garage wall and $350.00 for improperly installed cabinet trim and toe kicks in the kitchen. The trial court's reasoning for awarding damages for these two claims was that this dispute arose from the sale of a new residential house, and as such, the Schumachers, as new home buyers, expected that these items would be installed properly. The trial court stated: "You're buying a completed house . . . you expect it to be properly installed . . . So proper installation is part of purchase (sic) of a new house." (Oral Decision pg. 14 lines 20-21). The trial court then discussed the inspection addendum and ruled that it was enforceable and "fatal, I think, to quite a few of the

Schumachers' claims." (*Id.* at pg. 16, lines 15-16). The trial court then proceeded to address a number of alleged construction defects and determine whether each was due to improper installation, and if so, whether the defect could have been observed at the time of the walk-through, which occurred just prior to closing. The trial court found that the kitchen defects and the garage stone defects were the only two items that were both improperly installed and were not visible upon inspection at the time of the walk-through. (Oral Decision pg. 17, lines 7-9, lines 23-24). All of the other improperly installed items were visible at the time of inspection and damages for them were denied by the trial court.

The two-prong test applied by the trial court has no basis in any statute or case law. It was created sua sponte by the trial court. It was not suggested or argued by counsel for either party. (CP 37-54). Both prongs of the test are flawed. First, the trial court's assumption that a buyer of a new home has a legal cause of action for an improperly installed item in a home is incorrect. Granted, a new homebuyer likely has a hope and expectation that the items will be installed properly in the home. However, for reasons stated above, a new homebuyer has no cause of action against the seller for an improperly installed item unless there is a breach of an express warranty, breach of implied warranty of habitability, fraudulent concealment or CPA violation. TGC owed no duty of proper

construction or proper installation to the Schumachers other than the implied warranty of habitability. Our Supreme Court stated:

> Beyond the terms expressed in the contract of sale, the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability, which arises from the sale transaction.

Stuart v. Coldwell Banker Comm. Group, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987). The first line in the quote above is significant. The starting point is the parties' contract. "Contracting parties have their remedies for breach and can negotiate for warranties if they so choose." *Warner*, 128 Wn. App. at 42. But absent a warranty in the contract, the only warranty in the sale of a new home is the implied warranty of habitability. *Stuart*, 109 Wn.2d at 417. With the exception of the doctrine of implied warranty of habitability, no Washington court has ever recognized an implied warranty in the sale of a new home pertaining to construction defects. Without expressly stating so, the trial court effectively imposed upon TGC a warranty of workmanship despite the fact that there is no warranty of workmanship in the REPSA.

The second prong of the trial court's self-created two-prong test is flawed as well. The trial court, after determining whether or not an item was improperly installed, then examined whether the improperly installed item could have been observed by the Schumachers during the walk-

through that occurred prior to closing. In other words, it was significant to the trial court whether the defect was conspicuous or latent. It was a fundamental part of the trial court's decision. However, that distinction, although interesting, is irrelevant in this case. The is no Washington statute or case law providing that a seller of a home is liable for defects that a buyer is not able to view during a reasonable inspection prior to purchase. Whether an improperly installed item was conspicuous or latent at the time of inspection would be relevant only if the Schumachers had asserted a claim for fraudulent concealment. One of the elements of a fraudulent concealment claim is that "a careful, reasonable inspection on the part of the purchaser would not disclose the defect." *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990). The is no statute or any case law that holds that a seller is liable for latent defects but not for conspicuous defects.

In short, the trial court created its own litmus test for deciding whether the Schumachers are entitled to damages for constructions defects. The trial court's test was that if an item was improperly installed and it could not have been observed by the Schumachers, then the Schumachers are entitled to damages for that item. This test has no basis in the law. The premise underlying the trial court's decision is that a builder is obligated to properly install every item in and around a house.

This is not the law in Washington. There is no implied warranty of workmanship in Washington. TGC did not made any express warranty and did not breach any implied warranty.

C. ITEMS NOT RECEIVED

1. Overview

The Schumachers alleged that their house did not contain certain items listed in the advertising sales flyer (Ex. 8) and MLS listing (Ex. 9). They alleged 27 items that they did not receive: (1 no cedar posts or corbels, 2 no arch openings, 3 faucets are Moen instead of CFG, 4 utility faucets are not Delta, 5 no over/under counter lights in kitchen, 6 wiring and bracing for ceiling fans, 7 no study built-ins, 8 no crown moulding, 9 no 5 1/4 inch MDF base boards, 10 no raised panel cabinet doors with square tops, 11 no ornamental wood staircase, 12 no window sill in stairwell window, 13 no front windows not divided, 14 no plants, shrubs, trees, 15 no topsoil in backyard, 16 insufficient sod in front yard, 17 no HOA dues, 18 no RV parking, 19 ceiling fans, 20 high tech cabling, 21 no skylights, 22 no vaulted ceilings, 23 **no cedar fence**, 24 insufficient size of lot / acreage, 25 wrong color of granite countertops, 26 no cleaning, 27 insufficient size of kitchen island) (Pg. 2 of Ex. 30, COLs 9-11). The bold face item above is the only item in this list at issue on appeal.

The trial court rejected 26 out of 27 of their breach of contract claims for items allegedly not received. (COLs 9-11). The 26 claims were rejected for the following reasons: (1) the sales flyer and the MLS listing ad, both of which pre-dated the REPSA, were not incorporated by reference into the REPSA and were superseded by the operation of the integration clause in the REPSA; (2) the REPSA in paragraph x obligates the buyer to investigate and verify the condition of the property and provides that the buyer's failure to object prior to closing constitutes the buyer's acceptance of the property in its present condition; (3) the inspection addendum in the REPSA requires the buyer to inspect the house and the buyer is deemed to approve all of the improvements in the house unless the buyer cancels the sale; and (4) the Schumachers had knowledge of and consented to these items and/or their absence. (COLs 9-11).

Nonetheless, the trial court awarded damages to the Schumachers on 1 out of 27 of their breach of contract claims for items that they allegedly did not receive. Namely, the trial court awarded damages of $3,400.00 to the Schumachers because TGC did not build a cedar fence. (COL 14).

2. Cedar Fence

a. Introduction

The sales flyer and the MLS listing both represented that the house had a cedar fence. The sales flyer states: "Cedar fence". (Ex. 8). The MLS listing states: "Cedar fencing". (Ex. 9). These representations were true. There was an existing split-rail cedar fence located in the back yard behind the Schumachers' house. (FOF 8). Photos of this cedar fence can be viewed in Trial Exhibit 49, photos H, I, and J and Trial Exhibit 76 photo 5. The cedar fence in the Schumachers' back yard is plainly visible from inside the Schumachers' completed home as shown in Exhibit 76, photo 5.

This cedar fence existed prior to construction. (FOF 8). It was not built by TGC. (FOF 8). TGC built a pre-stained wood fence (not a cedar fence) in the front of the house. (FOF 24). The trial court, referring to the new fence built by TGC in the front of the house, stated in its oral decision that the Schumachers "got a fence that looks to me like it was well constructed and looks good, but it's not a cedar fence." (Oral Decision pg. 19, lines 14-15.

The trial court's conclusion that the Schumachers are entitled to $3,400.00 because TGC did not build a new cedar fence is erroneous for several independent reasons.

b. They *did* get a Cedar Fence

First and foremost, the Schumachers did get a cedar fence. This is one of the trial court's findings of fact. There was an existing split rail cedar fence separating their back yard from the neighboring property. (FOF 8). This ends the inquiry. There is nothing in the sales flyer or the MLS listing stating that TGC will build a new cedar fence in the front of the house or that the cedar fence is not a split rail fence. In short, the sales flyer and the MLS listing represented that the house would come with a cedar fence, which it did.

c. Cedar Fence Not in the REPSA

Even if the Schumachers had not received a cedar fence, there would be no breach of contract, because TGC had no contractual obligation to build any fence, much less a cedar fence. The last six pages of the REPSA (Ex. 1) contain the builder's specifications concerning the interior and exterior of the house. There is nothing in the REPSA (including the spec sheet) about a fence. In its oral decision, the trial court noted this fact. The trial court stated: "the language of the contract and the specs, it doesn't say fence." (Oral Decision pg. 19, lines 11-12). The only mention of the word "fence" is in the sales flyer and the MLS listing ad. But neither of those documents were incorporated by reference in the

REPSA and they were both superseded by the REPSA. (FOF 13, COLs 9-10). The REPSA incorporated by reference eight documents (addenda, forms and the spec sheet), which are listed on the first page of the REPSA. (First page of Ex. 1). The sales flyer and the MLS listing are not on the list of documents incorporated by reference. They were both superseded by the REPSA's integration clause, which provides in part:

> This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations.

[Ex. 1; para. n (4th pg. of the REPSA); COLs 9-10]. Conclusion of Law no. 9 (unchallenged) states:

> [T]he sales flyer and the MLS listing ad, both of which pre-dated the REPSA, were not incorporated by reference in the REPSA and were superseded by operation of the integration clause in the REPSA.

This conclusion was not challenged by the Schumachers. It is the law of this case. *See Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014). Since the Schumachers cannot rely on either the sales flyer or the MLS listing ad, the Schumachers have no claim for a cedar fence because there is no reference or mention of a cedar fence in the contract documents.

Nonetheless, the trial court relied on *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) to conclude that TGC was obligated to

build a new cedar fence. (Oral Decision pg. 19). "And this is where *Berg v. Hudesman* comes in." (*Id.* at pg. 19, line 7).

The trial court erroneously relied on *Berg v. Hudesman*. It is black letter law that a court may not add a term to a contract. "[P]arol or extrinsic evidence is not admissible to add to . . . written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud or mistake." *Berg*, 115 Wn.2d at 670 (quoting *Buyken v. Ertner*, 33 Wn.2d 334, 341, 205 P.2d 628 (1949)). Here, the trial court erroneously added a term to the REPSA. The REPSA did not require the building of a fence. The trial court erred in concluding that TGC was contractually obligated to build a cedar fence.

d. Waived by the Inspection Contingency

Arguing further in the alternative, even if there were no cedar fence on the property and even if TGC had obligated itself to build a new cedar fence, the Schumachers' claim concerning the cedar fence was waived by terms in the RESPSA requiring them to verify and inspect the house.

Paragraph x of the REPSA (located on the 5th page of the REPSA) obligated the Schumachers to investigate and "verify all information provided from Seller or Listing Firm related to the Property" and that

"[t]his condition shall be deemed satisfied unless the Buyer gives notice", in which case the earnest money will be refunded. (Ex. 1, para. x).

The Inspection Addendum (located on the 13th page of the REPSA) requires the buyer to inspect the house and that the buyer is deemed to approve all of the improvements in the house unless the buyer cancels the sale. (Ex. 1; COLs 9-11). Specifically, the Inspection Addendum in the REPSA provides:

> ATTENTION BUYER: If Buyer fails to give timely notice, then this Inspection contingency shall be deemed waived and Seller shall not be obligated to make any repairs or modifications.
>
> ATTENTION BUYER: . . . Buyer's inaction during Buyer's reply period shall result in waiver of this Inspection condition, in which case Seller shall not be obligated to make any repairs or modifications whatsoever AND THIS CONTINGENCY SHALL BE DEEMED WAIVED.

(FOF 15). The REPSA, including the Inspection Addendum, was prepared by the Schumachers—not TGC. (Oral Decision pg. 14 lines 1-5, pg. 15 lines 16-20).

The Schumachers viewed the home on at least 10 different occasions before closing, including a formal walk-through. (FOFs 25-28). Neither during nor after the walk-through did the Schumachers ever object to the existing cedar fence in the back yard or that the new fence in the front yard was not cedar. The Schumachers made certain objections and

requests during and shortly after their walk-through, but these were all addressed by TGC to the Schumachers' satisfaction. (FOF 30). The sale of the home was conditioned upon their "subjective satisfaction". (First sentence of the Inspection Addendum, Ex. 1). The Schumachers had the right to cancel the sale if they were unsatisfied in any way. The trial court in its oral decision correctly pointed out:

> [The Inspection Addendum] doesn't even require the person to have reasonable behavior. There's no objective person standard. There is subjective satisfaction. So if they just don't like it because the color is wrong or about anything, they can walk away from the deal. So that's very broad.

(Oral Decision pg. 15 lines 14-19). The Schumachers never requested to cancel the sale and/or have their earnest money returned to them. (FOF 31). By proceeding to closing without objecting to the fact that the new fence built by TGC in their front yard was not a cedar fence, the Schumachers waived their right to later assert a claim for this.

The Inspection Addendum was the basis of the trial court's rejection of many of the Schumachers' claims. Concerning the inspection addendum, the trial court in its oral decision stated: "So I think I've got to enforce this, which is fatal, I think, to quite a few of the Schumacher's claims." (Oral Decision pg. 16 lines 14-16). For example, the trial court rejected the Schumachers' claim for not getting crown molding in a certain area of the home because "the lack of it being installed was

obvious on inspection." (*Id.* at pg. 17, lines 20-21). Concerning the Schumachers' claim for improperly installed stone on the fireplace, the trial court rejected that claim because it "was visible on inspection." (*Id.* at pg. 20, line 4). Nonetheless, when it came to the cedar fence, the trial court ignored the inspection addendum. (*Id.* at pg. 19). Given that the trial court ruled that the inspection addendum was enforceable and applicable to other visible defects and missing items, the trial court erred by not enforcing it as to the Schumachers' claim of not getting a cedar fence.

D. PREVAILING PARTY

1. Introduction

If this Court reverses the trial court's award of damages to the Schumachers, then the Court should also reverse the trial court's award of attorney fees and costs to the Schumachers. TGC was the substantially prevailing party and should have been awarded attorney fees and costs by the trial court.

Arguing in the alternative, even if the Court affirms the trial court's award of damages to the Schumachers, the Court should still reverse the trial court's award of attorney fees and costs to the Schumachers. The Schumachers were not the substantially prevailing

party. TGC was the substantially prevailing party and should have been awarded attorney fees and costs by the trial court.

Arguing further in the alternative, both parties substantially prevailed at trial. Therefore, neither party should have been awarded attorney fees or costs by the trial court.

As stated above, the trial court's ruling that the Schumachers were the prevailing party for purposes of an attorney fee award should be reviewed under the error of law standard, which permits the reviewing court to substitute its judgment for that of the trial court. *Trotzer v. Vig*, 149 Wn. App. 594, 612, 203 P.3d 1056 (2009).

2. Substantially Prevailing Party – "Extent of Relief Afforded" Approach

At trial, the Schumachers asserted damages in the amount of $71,499.07 of which $23,496.60 pertained to alleged construction defects and $48,002.47 pertained to items allegedly not received by the Schumachers. (Ex. 30; Oral Decision pg. 20, lines 17-18: "[Trial] Exhibit 30 . . . is an outline of the claims of the Schumachers"). The trial court awarded a total of $9,772.50 to the Schumachers. (CP 110-112). This represents just 13.67% of their alleged damages. The Schumachers prevailed on only 2 out of 22 claims for construction defects. (FOF 37;

COL 5, Exs. 24-30; 35-39). The Schumachers prevailed on only 1 out 27 claims for breach of contract. (Pg. 2 of Ex. 30; CP 109-110, COLs 9-11).

The trial court rejected the Schumachers' claims of: (1) breach of implied warranty of fitness for a particular purpose, (2) breach of implied warranty of habitability and (3) Consumer Protection Act violations. (COLs 1 – 4).

The trial court characterized most of the Schumachers' claims not as weak on the facts, but as weak on the law. (Transcript of Proceedings 2/26/16 pg. 18, lines 17-23). Nonetheless, the trial court ruled that the Schumachers were the substantially prevailing party. (*Id.* at pg. 19, lines 6-8).

"In general, a prevailing party is one who receives an affirmative judgment in his or her favor." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). But, "[i]f neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of relief afforded to the parties." *Id.*

Here, neither party wholly prevailed. Thus, the issue is who was the substantially prevailing party. According to the Supreme Court in *Riss v. Angel, supra,* the determination of who is the substantially prevailing party depends upon the extent of relief afforded. If the trial court had

properly applied an "extent of relief afforded" analysis to this case, TGC would have been the substantially prevailing party. The Court awarded the Schumachers only 13.67% of their alleged damages. Stated differently, TGC successfully defended 86.33% of the Schumachers' alleged damages. The Schumachers prevailed on only 2 of 22 of their construction defect claims and prevailed on only 1 of 27 of their breach of contract claims. The Schumachers' other claims concerning express and implied warranties were rejected by the trial court.

The trial court erred in ruling that the Schumachers were the prevailing party. TGC—not the Schumachers—was the prevailing party.

3. Proportionality Approach – *Marassi v. Lau*

In *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), the Marassis contracted to purchase a lot in a housing development. The seller agreed to make improvements to the lot and to common areas of the development. The contract contained an attorney fee clause. *Marassi,* 71 Wn. App. at 913. The Marassis asserted 12 damage claims totaling $88,450. The trial court found in the Marassis' favor on a $15,000 claim for north slope damages and on a specific performance claim for laying underground utilities. The court dismissed the remaining 10 of the Marassis' claims with prejudice, including the claims for south slope damages, delay damages, failure to properly hydroseed, fraudulent

conveyance, and misrepresentation. The trial court awarded attorney fees of $12,285 to the plaintiffs Marassis as the prevailing parties. *Marassi*, 71 Wn. App. at 914.

On appeal, the seller argued that because the majority of the Marassis' claims were dismissed, the Marassis were not the prevailing party even though the Marassis received an affirmative judgment. The Court of Appeals agreed and reversed the trial court's award of fees to the Marassis. The Court of Appeals stated:

> **These general principles, however, do not address situations in which a defendant has not made a counterclaim for affirmative relief, but merely defends against the plaintiff's claims.** Dynasty asserts that if a defendant successfully defends against the plaintiff's contract claims, it is a prevailing party entitled to attorney fees. The plaintiffs in each cited case were entirely unsuccessful and received no recovery; the defendants were deemed prevailing parties. Similarly, this court in *Marine Enterprises* recognized that a successful defendant should be permitted to recover as a prevailing party.
>
> **In the case at hand, the Marassis did receive an affirmative judgment, but on only 2 of the original 12 claims.** In this circumstance, we believe that application of the net affirmative judgment rule or "substantially prevailing" standard does not obtain a fair or just result. Under the affirmative judgment rule, the Marassis are prevailing parties because they received an affirmative judgment in their favor, even though Dynasty successfully defended against the majority of the claims. Similarly, the substantially prevailing standard set forth in *Rowe v. Floyd, supra*, does not adequately resolve the issue. Although appropriate in some cases, it fails on facts such as these

> where multiple distinct and severable contract claims are at issue. In such a situation, the question of which party has substantially prevailed becomes extremely subjective and difficult to assess.
>
> We hold that when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate. A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset.

Marassi, 71 Wn. App. at 916-17 (Emphasis added, citations omitted).

Under the *Marassi* proportionality approach, TGC should have been awarded attorney fees and costs, considering that: (1) TGC prevailed on the implied warranty of habitability claim; (2) TGC prevailed on the implied warranty of fitness for a particular purpose claim; (3) TGC prevailed on 20 of 22 construction defect claims and (4) TGC prevailed on 26 of 27 breach of contract claims for items not received.

A party who prevails on an implied warranty of habitability claim is entitled to an award of attorney fees and costs if the contract contains an attorney fee clause, even though the implied warranty of habitability is not an express term of the contract.

> By statute, attorney fees are awarded to the prevailing party in an action on a contract that specifically provides for attorney fees and costs incurred to enforce its provisions. The warranty of habitability exists independently of any express terms of the contract for sale. It arises by implication from the sale transaction itself. **But the**

> **implied warranty of habitability is an implied-in-law term of the contract for sale for the purposes of attorney fees.** Here, the purchase and sale agreement provides for attorney fees to the prevailing party in any dispute arising from the sale, including an implied warranty claim.

Burbo v. Harley C. Douglas, Inc., 125 Wn. App. 684, 701, 106 P.3d 258 (2005) (Emphasis added) (Citations omitted).

Here, the attorney fee clause in the REPSA provides for an award of attorney fees and costs to the prevailing party "if Buyer or Seller institutes suit against the other concerning this Agreement". (Ex. 1, para. q.). All of the Schumachers' claims against TGC arise from the REPSA. Thus, TGC should be entitled to an award of attorney fees and costs for all of the claims on which it prevailed.

4. Net Affirmative Judgment to Plaintiff

The Schumachers argued to the trial court that the prevailing party is *always* the party who obtains a net affirmative judgment in its favor. (CP 57, 89; Transcript of Proceedings 2/26/16 pg. 6-7).

If that were indeed true, a defendant who does not assert a counterclaim would never be eligible for an attorney fee award. TGC did not assert a counterclaim against the Schumachers. (CP 9-13). In *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 915 P.2d 1146 (1996), this Court recognized the unfairness of the net affirmative judgment rule in a case

(such as the instant case) where a defendant does not assert a counterclaim and a plaintiff prevails on only a few claims.

> The net affirmative judgment rule, however, may not lead to a fair or just result in situations where a party receives an affirmative judgment on only a few claims. *Marassi*, 71 Wn. App. at 916. In *Marassi*, the plaintiff prevailed on only two of the original 12 separate and distinct claims. *Marassi*, 71 Wn. App. at 916.

Phillips Bldg. Co., 81 Wn. App. at 702.

The case of *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 115 P.3d 349 (2005) is a good example of a case where a net affirmative judgment was awarded to a plaintiff, but the defendant was awarded attorney fees and costs. In *Crest*, a subcontractor was awarded a net affirmative judgment in the amount of $45,368 against a general contractor. "At the end of the bench trial, the court granted judgment for [the subcontractor] for the unpaid balance of the contract, with prejudgment interest, and for change orders, for a total of $45,368.61." *Crest*, 128 Wn. App. at 767. However, notwithstanding the fact that plaintiff subcontractor was awarded a net affirmative judgment in its favor, the trial court ruled that the general contractor was the substantially prevailing party and awarded $108,148 in attorney fees and costs to the general contractor. "After the awards were offset, [the general contractor] received a net judgment of $62,780.19." *Id.* at 767. The Court of Appeals

affirmed the trial court's award of attorney fees and costs to the general contractor.[9] *Id.* at 772-73.

No Washington case has ever held that a defendant must be granted affirmative relief to be a prevailing party. "The defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff's claims." *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW., Inc.*, 168 Wn. App. 86, 99, 285 P.3d 70 (2012).

5. No Attorney Fee Award

Arguing further in the alternative, the trial court should not have made any attorney fee award, because both parties prevailed on major issues. If both parties prevail on major issues, neither qualifies as the prevailing party. In *Am. Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990), the Supreme Court stated, "However, because both parties have prevailed on major issues, neither qualifies as the prevailing party." In *Sardam v. Morford*, 51 Wn. App. 908, 911-12, 756 P.2d 174 (1988), the court stated:

[9] The Court of Appeals remanded the case to the trial court with instructions to provide a written basis for limiting the fee award to $108,148, which had been calculated using a Whatcom County hourly rate of $180 per hour. *Crest.* 128 Wn. App. at 774-76.

> [W]here both parties prevail on major issues, neither is entitled to attorney fees. (citations omitted) Here, each party successfully defended against a major claim by the other. It would be inequitable to award substantial fees in these circumstances . . .

See also, Country Manor MHC, LLC v. John Doe Occupant, 176 Wn. App. 601, 613, 308 P.3d 818 (2013) ("But if both parties prevail on major issues, both parties bear their own attorney fees.")

VI. REQUEST FOR ATTORNEY FEES AND COSTS

Paragraph q. of the REPSA provides in part: "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." (4th page of Ex. 1). Pursuant to RAP 18.1 and the attorney fee clause in the REPSA, TGC requests an award of attorney fees and costs if it prevails on appeal.

VII. CONCLUSION

The trial court erred in awarding any damages to the Schumachers and also erred in awarding them attorney fees and costs.

Dated this 6th day of June 2016

LINVILLE LAW FIRM, PLLC

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PROOF OF SERVICE

I certify that I sent a copy the foregoing Brief of Appellant to attorneys Joseph T. G. Harper and to Christopher M. Constantine, counsel for plaintiffs Schumachers, on June 6th, 2016 via email to their email addresses at harperlawoffices@comcast.net and ofcounsl1@mindspring.com pursuant to a pre-existing agreement concerning service of pleadings via email between myself and Mr. Harper and Mr. Constantine in this action.

Dated this 6th day of June 2016

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